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IN THE

Supreme Court of the United States

No. [redacted] /91

In the Matter of the Application of JULIA IOANNOU for leave to withdraw funds deposited with the Treasurer of the City of New York for the benefit of VIKTORIA MICULKA in the Estate of

ALEXANDER MAREK,

Deceased.

JULIA IOANNOU,

Petitioner-Appellant,

PEOPLE OF THE STATE OF NEW YORK and JOHN T. MEEHAN, as Public Administrator of the County of Bronx,

Respondents-Appellees.

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

I. Opinions Below

(a) The Court of Appeals of the State of New York rendered no opinion on making the order sought to be reviewed. Its decision is reported in 11 N. Y. 2d 740, 181 N. E. 2d 456. The official report of the decision is contained in the appendix (*infra*, pp. 21-22).

(b) The Appellate Division of the New York State Supreme Court rendered no opinion upon affirming the Surrogate's Court of the County of Bronx. Its decision is reported in 13 App. Div. 2d 917, 217 N.Y.S. 2d 1010.

(c) The Surrogate's Court of the County of Bronx rendered an opinion which is not officially reported. It is reported unofficially in the New York Law Journal of June 20, 1960, Volume 143, No. 118, at page 13, column 5. It is printed in the appendix (*infra*, p. 23).

II. Grounds for Jurisdiction

The grounds upon which the jurisdiction of this Court is invoked are as follows:

(a) The proceeding was brought in the Bronx County Surrogate's Court of the State of New York under Section 269 of the Surrogate's Court Act of the State of New York (now Section 269-a) to obtain an order directing the City Treasurer of the City of New York to pay over to petitioner the amount of $11,631.76. This fund had theretofore been deposited in the City Treasurer's office by decree of the said Surrogate's Court entered June 27, 1956, to the credit of petitioner's assignor, Viktoria Miculka, a distributee of the above named decedent, Alexander Marek.

The Surrogate dismissed the petition upon the authority of *Matter of Geiger*, 7 N. Y. 2d 109, 164 N. E. 2d 99, which was decided by the New York Court of Appeals on December 30, 1959, after this proceeding had been instituted and while it was pending.*

Petitioner appealed to the Appellate Division of the Supreme Court of the State of New York, which affirmed without opinion, and thereafter appealed to the New York Court of Appeals, which similarly affirmed without opinion.

The appeal to the Court of Appeals was taken as a matter of right pursuant to Section 588, Subdivision 1(a) of the New York Civil Practice Act on the ground that there was directly involved in this proceeding the construc-

* The opinions in *Matter of Geiger* are set out in the appendix, *infra*, pp. 23-27.

tion of the Constitution of the State of New York and of the United States (R. 73).* Appeal other than on a constitutional ground would not have been permissible as of right in this proceeding (Cf. *infra*, pp. 21-22).

(b) The date of the order of affirmance by the Court of Appeals which is sought to be reviewed is February 22, 1962. It was entered in the office of the Clerk of that Court on said date. No application for a rehearing was made. The notice of appeal was filed in the office of the Clerk of the Surrogate's Court of Bronx County on May 3, 1962.

(c) The statutory provisions believed to confer on this Court jurisdiction of the appeal are found in Title 28 of the United States Code, Section 1257, Subdivision 2.

(d) Cases believed to sustain jurisdiction are as follows:

Dahnke-Walker Milling Co. v. *Boudurant*, 257 U. S. 282, 288-9;
Fiske v. *Kansas*, 274 U. S. 380, 385-6;
Nashville C. & St. L. R. Co. v. *Walters*, 294 U. S. 405;
Marcus v. *Search Warrant*, 367 U. S. 717, 721.

(e) The text of the statute involved, to wit, Section 269 (now 269-a, Subdivision 1) of the Surrogate's Court Act, to the extent that it is material to the issue of this proceeding, reads as follows.

> "Where it shall appear that a legatee, distributee or beneficiary of a trust would not have the benefit or use or control of the money or other property due him, or where other special circumstances make it appear desirable that such payment should be withheld, the decree may direct that such money or other property be paid into the surrogate's court for the

* References are to pages of the Record on Appeal to the Court of Appeals.

benefit of such legatee, distributee, beneficiary of a trust or such person or persons who may thereafter appear to be entitled thereto. Such money or other property so paid into the court shall be paid out only by the special order of the surrogate or pursuant to the judgment of a court of competent jurisdiction."

The statute in its original form as it existed at the commencement of this proceeding is found in the official edition of New York State Laws of 1939, Chapter 343, effective April 24, 1939. In its present form, which is identical in text and merely renumbered, it is found in the official edition of New York State Laws of 1960, Chapter 975, effective April 28, 1960.

III. Question Presented

The question presented by this appeal is whether Section 269-a, Subdivision 1, as construed by the Court of Appeals in this case following its prior decision in *Matter of Geiger, supra,* is unconstitutional by reason of being repugnant to the Fourteenth Amendment of the Constitution of the United States, to the extent that it inhibits the assignment by said Viktoria Miculka, a distributee of the estate of a New York decedent, of her interest in such estate which had been deposited pursuant to the statute under consideration to her credit with the City Treasurer of the City of New York, where the assignment was made voluntarily, without duress, as a donation based upon a reasonable and justifiable motive, in the United States Embassy in Prague, Czechoslovakia.

Appellant contends that the construction of the statute adopted by the Court of Appeals denies appellant and her assignor, Viktoria Miculka, the equal protection of the law and due process, because it treats petitioner and said assignor differently from other distributees of estates of New York decedents who may voluntarily assign their

interests, gives no effect to the hearing establishing the voluntary character of the gift and discriminates against petitioner and her assignor to their disadvantage.

IV. Statement of the Case

Prior Proceedings

The proceeding was commenced June 5, 1958 to withdraw funds from the New York City Treasurer's office (R. 5). Funds had been deposited to the credit of Viktoria Miculka, petitioner's assignor, pursuant to Section 269 of the Surrogate's Court Act, by an earlier decree settling the account of the Public Administrator on June 27, 1956 (R. 9-10).

The Attorney General interposed a general denial (R. 13). The Public Administrator appeared but filed no answer (R. 1).

The amount of the fund involved is $11,631.76 (R. 11). The decree directing the deposit, so far as material here, reads as follows (R. 9-10):

> "• • • and it further appearing that VIKTORIA MICULKA and SOFIE HORAK are residents of Czechoslovakia, and that it is improbable that they would have the beneficial use and enjoyment of the monies to which they are entitled hereunder, • • • it is further ORDERED, ADJUDGED AND DECREED • • •
>
> (c) That out of the distributive share of VIKTORIA MICULKA, aunt of the decedent, the Administrator pay to SOL HULNICK, Esq., attorney-in-fact for said VIKTORIA MICULKA, the sum of $3,877.26 as and for his compensation as attorney-in-fact;
>
> (d) To the Treasurer of the City of New York the balance of said distributive share of VIKTORIA MICULKA, to wit, the sum of $11,631.76 for the credit

of said VIKTORIA MICULKA, and said City Treasurer is directed to deposit the said sum in any savings bank in the County of Bronx for the credit of said Viktória Miculka, and subject to the further order of this Court;".

The Facts

Substantially all of the evidence at the trial was testimony given by petitioner on examination before trial in New York on February 3, 1960 (R. 21). Counsel for both respondents appeared (*id.*) and the Attorney General cross-examined (R. 44, *et seq.*). Petitioner, who resides in London, England, had expected to come back for the trial, but unfortunately she developed a gall bladder condition, was ill and could not travel (R. 31, 61). No witnesses were called by appellees.

Petitioner's mother, whose name was Julia Zizkova, was a cousin of the beneficiary, Mrs. Miculka (R. 22). Petitioner has known Mrs. Miculka all her life (*id.*). Petitioner is thirty-five years old (*id.*). Mrs. Miculka is eighty-two and petitioner's mother, if alive, would have been seventy-seven (R. 24). She died March 14, 1958 (R. 49). Petitioner's father died in 1954 (R. 24). She has no brothers or sisters (*id.*) and no close relatives living in Czechoslovakia (R. 49-50).

Petitioner's husband is British (R. 27). He and petitioner live in London (R. 28). They were married in Prague in November 1955, and immediately applied for permission to leave, which came in August 1957 (*id.*). They left Czechoslovakia on August 27, 1957, accompanied by their baby and have lived in London since (R. 39). The only time petitioner visited Czechoslovakia since then was in March 1958, on the occasion of her mother's demise (R. 48-49).

The question of transferring the funds was first discussed in the early part of March 1957 in a visit by peti-

tioner to Mrs. Miculka (R. 28-29). Petitioner testified to the pertinent part of the conversation as follows (R. 31-32):

> "My aunt showed to be very anxious about my well-being and spoke to me that she would like me to be very happy because I deserve it as Julia's daughter, and she would wish me all the happiness and would like to help me, and so on. She said, 'We look like they do: in bad condition. I have the money in America and it is no help neither to my daughter'—the only one she cared for—'and if it would be helpful to you I would only be too happy to help you.'
>
> "Well, I said to my aunt, 'To be quite frank, I am coming for this matter, and my husband is British, and I am trying to get out of the country, and I shall succeed to get out of the Country, and there is reasonable hope that I shall get out of the country.'
>
> "Then I said, 'Would you like to give me that money because you just can't use them here and I could need them very much, and you know that I like you and I always try to send you presents, in spite of the fact that today our financial position is far, far from being so good like before. And I certainly shall always continue to be thankful to you and try to help you and to thank you,' and all that.
>
> "And she said, 'I am quite willing to do that because for me it is very difficult: feeling I have some money and I consider myself rich, and all the same nobody from us can have anything from it. And I would like to do it'."

The next conversation took place in petitioner's mother's house in Prague, when Mrs. Miculka and her daughter visited with petitioner (R. 33). The pertinent part of this conversation is as follows (R. 34-35):

> "When we discussed this she said she can't ever forget what my mother did for her, and she was only

happy to pay her back by helping me, and she actually is doing that for my mother because she doesn't want my mother to worry about my future and financial situation, and so on, and so on. And she laughed and she said, 'You will send me chocolate and good coffee from England,' and such."

Following this conversation, petitioner's husband made inquiries at the American Embassy and arrangements for execution of the assignment. On May 12, 1957, Mrs. Miculka and her daughter returned to Prague, were informed of the arrangements and shown the assignment (R. 35-36) or "Declaration of Donation" as it is entitled (R. 39). The document was prepared in Czech by petitioner and the English version by her husband (R. 46). The assignment appears in English at R. 12. The original document is a double-column paper, one side in Czech and one side in English translation, both versions signed by Mrs. Miculka.

On May 13, 1957, petitioner, Mrs. Miculka, her daughter and Dr. Ioannu went to the American Embassy, where the assignment was executed before Vice Consul Thomas R. Craig (R. 12). Since the events at the Embassy are of such vital importance in this case, we shall not paraphrase or excerpt the testimony, but request the Court to read it in its entirety in the record. Petitioner's version on direct is at R. 36-38. Her cross-examination appears at R. 47. There can be no doubt from the testimony that there was no pressure applied on Mrs. Miculka to execute the document and that she read it, understood it and wanted it.

Petitioner sought to take Mrs. Miculka's testimony by deposition at the America Embassy in Prague through the United States Department of State. The Department advised that the deposition could not be executed without obtaining the permission of the Czechoslovakian authorities to interrogate the witness (R. 65). For obvious reasons this was not acceptable, and the commission was abandoned.

The record contains several letters offered in evidence but excluded, written by Mrs. Miculka or for her by her daughter to petitioner and petitioner's counsel, showing her full knowledge of this proceeding and her desire for petitioner to have the fund. These letters are all recent (Exhibit A, November 30, 1959 (R. 57, 66); Exhibit B, October 28, 1959 (R. 58-59, 66); Exhibit C, November 19, 1959 (R. 59-60, 66); Exhibit D, Christmas 1959 (R. 43, 62, 66); Exhibit E, June 2, 1959 (R. 63, 66)).

A typical excerpt from one of these letters reads as follows (R. 60).

> "Julia, you must ask them, politely, I don't think it possible their hearts would be so hard not to give you what I gave you. So fly over there in this America, and don't forget to send me a nice card there! And you shall have a nice Christmas and I something sweet for my tooth."

This letter was positively identified as coming from Mrs. Miculka (R. 42). The letter to counsel is also positively identified (R. 44) and leaves no doubt of Mrs. Miculka's desire (R. 63).

The fund is not blocked by Federal Regulations and is free for transfer, subject to the disposition of this proceeding (R. 55-56).

Raising the Federal Questions

The federal questions sought to be reviewed were first raised at the commencement of the hearing (R. 17-18) on the argument of a motion by the Attorney General to dismiss the petition (R. 14, *et seq.*). The Surrogate at this point reserved decision on the motion (R. 19).

The federal question was again raised on renewal of the motion to dismiss at the end of petitioner's case (R. 53-54). Exception was duly noted (R. 55).

The question was raised again in the Appellate Division by argument in Point II of appellant's brief, the point heading reading as follows:

> "If Section 269 is construed to inhibit any voluntary gift of the beneficiary's interest even though not subject to confiscation by a foreign government, it is uncontitutional and void"

citing Amendment XIV, Subdivision 1 of the United States Constitution.

The federal question was again raised in the Court of Appeals by specific statement in the notice of appeal as required by statute (R. 73), and again in the brief to the Court of Appeals, Point II, in identical language with that contained in the Appellate Division quoted immediately above.

The statement of appellant's position to the Surrogate was first set forth as follows (R. 17-18):

> "I contend, and I want to state for the record, that, as a matter of constitutional law, a distributee may freely and voluntarily make an assignment which is not subject to confiscation by any foreign government, provided such assignment is not made under duress and provided that such assignment satisfies your Honor that it was made voluntarily and freely. I contend that that is a use, benefit or control of the funds which is not prohibited by Section 269. On the other hand, if that section is construed to prohibit that kind of an assignment—one that is freely made—the statute deprives this distributee of property without due process of law, and I think that your Honor cannot determine that question without a hearing."

Later, at the close of the case, on the renewal of the motion to dismiss, appellant's counsel made the point as

follows (R. 53-55):

"Mr. Schwartz: I make the point—and I would like the record to show this—that, if Sec. 269 is construed to mean—and if the Geiger case is interpreted to mean—that, in no circumstances can a beneficiary living in, say, Czechoslovakia dispose of an interest in a New York estate as long as the present regime continues there, without regard to whether she can make a voluntary disposition where she can act of her own volition without duress and without even the knowledge of the foreign government, then the statute, in my opinion, is unconstitutional and void and goes beyond the power of the state to enact such a statute. The effect of that construction would be that all foreign legacies of this type—that is, legacies to foreign beneficiaries in iron curtain countries—are being confiscated by the State of New York.

The Court: No; they are not being confiscated; they are being kept and protected for the use and benefit of the person designated by the testator. And if such person does not continue to live, this property will be held for the benefit of his heirs or distributees.

Mr. Schwartz: That is the point I want to make. The use of the fund or the control or benefit of that fund is not limited to the actual physical receipt and spending of the fund in Czechoslovakia. If I own property—

The Court: If a person cannot freely and voluntarily assign such a fund, are the Courts of this state compelled to accept an assignment that is made under duress?

Mr. Schwartz: Under duress or force, no. However, where the assignment, as here, is freely and voluntarily made, where it is done without the control of the foreign government, where it is made in the American embassy, and made by the volition of this woman herself, then I say that that assignment should be rec-

ognized here. The mere fact that it is made in Czechoslovakia is not the controlling factor. In other words, it is not a question of geography; it is a question of whether she is acting without duress and without the control of the government where she is living.

The Court: The Court must follow Matter of Geiger and must grant this motion to dismiss the petition.

Mr. Schwartz: May I respectfully except?"

The Court accordingly dismissed the petition.

In the appellate courts, since the decisions were handed down without the statement of any opinion, and merely affirmed the Surrogate, the federal question was disposed of as the Surrogate had disposed of it, by sustaining the validity of the state statute against the argument of its unconstitutionality in relation to petitioner.

Substantial Character of Federal Questions

The federal grounds involved in this case are substantial and are of wide application. A similar statute of Oregon (Rev. Stats., § 111.070), was held unconstitutional in *Kolovrat* v. *Oregon*, 366 U. S. 187.

Section 269 of the Surrogate's Court Act was enacted in 1939 at a time when the Nazi government of Germany was confiscating property of Jews and others which was bequeathed or distributable to beneficiaries residing in Germany. At that time no state of war existed and the freezing orders promulgated by the President (Executive Order 8389) and those which followed had not yet come into force.

The notes accompanying the enactment and expressing the purpose for which Section 269 was passed read as follows (13B Gilbert Bliss, Civil Practice of New York, recompiled 1952, p. 155):

"This amendment is proposed by the Executive Committee of the Surrogates' Association of the State of New York. The purpose of the amendment is to

authorize the deposit of monies or property in the Surrogate's Court in cases where transmission or payment to a beneficiary, legatee, or other person resident in a foreign country might be circumvented by confiscation in whole or in part. The amendment authorizes the impounding of the funds by the Surrogate to await the time when payment can be made to the beneficiary for his own benefit, use and control."

The purpose of the statute is completely clear. It was enacted shortly prior to the outbreak of World War II, when the Nazi government had already effected *anschluss* with Austria, and the word "Munich" had acquired a secondary meaning of which the West was not proud. Confiscation by the Nazis was in full swing, but our Federal Government had not yet frozen foreign assets as it did later on April 10, 1940 when the first freezing order blocking Norwegian and Danish accounts was promulgated (Executive Order 8389).*

The statute itself does not state that a beneficiary of an estate may not deal with his property in any way that he sees fit. What it states is that where it shall appear that a beneficiary "would not have the benefit or use or control of the money or other property due him, or where other special circumstances make it appear desirable that such payment should be withheld" the money shall be paid into court subject to further order of the Surrogate. It should be noted that the words "benefit", "use", "control", as well as the words "other special circumstances", are all used in the alternative. When we compare the definition of these words with the purpose of the statute, their meaning is not at all ambiguous. The phrase "special circum-

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* It is very likely that if the Federal Government had stepped in to protect American assets from confiscation by the Nazis at an earlier time, there would have been no need for the enactment of Section 269 effective April 24, 1939.

stances", of course, means any situation where the fund might pass into the hands of a foreign government which would confiscate the funds and is a catchall so that the intent of the statute and its purpose could not be evaded by any exquisite scheme that did not precisely fit in with the more common words "benefit", "use" or "control".

The meaning of these words is very broad. The word "use" is defined in Webster's New International Dictionary, Second Edition, Unabridged, Springfield, Mass., 1949, page 2806, in 13 separate paragraphs as a noun and 12 separate paragraphs as a verb. As used in the statute, it most probably means to consume or to employ or to devote the property to the beneficiary's own purposes.

The word "benefit" is defined (op. cit., p. 253) as a noun, to include "act of kindness; favor conferred; gift; benefaction". As a verb, it is defined "to be beneficial to; to do good to".

The word "control" is defined as "to exercise restraining or directing influence over; to dominate; regulate; hence, to hold from action". As a noun, it is defined, among other things, as "the act or fact of controlling; power or authority to control; directing or restraining domination" (op. cit., p. 580).

The Court of Appeals of the State of New York in *Matter of Geiger, supra,* 7 N. Y. 2d 109, 164 N. E. 2d 99, has construed the statute to mean that a beneficiary whose fund had been deposited in the office of the City Treasurer, could not make an assignment of the fund with or without a hearing as to change in circumstances. The Court stated (7 N. Y. 2d at p. 112):

> "So long as the distributive shares are properly being withheld by the Surrogate because of the special circumstances in which the beneficiaries find themselves as domiciliaries in an iron-curtain country, they are in no position presently to assign any part of the

funds withheld. They may not place an assignee in a better position than they themselves enjoy as principals."

This Court is bound by this construction of the statute placed upon it by the highest court of the State of New York. *Minnesota ex rel. Pearson* v. *Probate Court*, 309 U. S. 270, 273; *Musser* v. *Utah*, 333 U. S. 95, 98; *Winters* v. *New York*, 333 U. S. 507, 514; *Oklahoma Tax Comm.* v. *Texas Co.*, 336 U. S. 342, 351 n. 20. The Surrogate, in dismissing the petition herein, expressly followed this construction of *Matter of Geiger* (R. 54, 67), and the appellate courts in this case affirmed without expressing any other reason.

The issue presented, therefore, is whether, without any hearing, the courts of New York have the constitutional power to deprive Viktoria Miculka, a beneficiary, of the right to make a voluntary gift of her interest in the estate of a New York decedent.

When the fund was originally deposited, there was no hearing and, of course, there could have been no hearing on the question of the making of the gift since no donation of the fund had then been made. Although the Surrogate in the proceeding followed the form of a hearing, he felt bound by *Matter of Geiger, supra*, and made no findings on the voluntary nature of the gift. He felt bound to refuse to recognize the assignment in the absence of proof of a change of the political climate in Czechoslovakia regarding restrictions on American exchange (R. 17).*

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* The Surrogate at this point in the record defined the "special circumstances" of the beneficiary which prohibited a valid assignment to be her status "as domiciliary in an iron curtain country." Nothing was said about her free volition to make the gift. This Court may make appropriate findings of fact based on the record, notwithstanding the refusal of the Court below to do so. *Carlson* v. *Curtiss*, 234 U. S. 103, 106; *Merchant's Nat'l Bank* v. *Richmond*, 256 U. S. 635, 638; *Brooklyn Savings Bank* v. *O'Neil*, 324 U. S. 697, 703.

In this context we are faced with the proposition that so long as Czechoslovakia restricts the rights of its nationals freely to receive American dollars or their equivalent, such nationals, under Section 269-a of the Surrogate's Court Act, are precluded from making any gift of their interests in estates of New York decedents which have been deposited for their ostensible protection with the City Treasurer, even though such gift is made freely, voluntarily, without duress, under circumstances where it can never come into control of the Czechoslovakian Government and where the evidence adduced at a hearing conclusively shows a natural motive and complete freedom of volition in making the gift.

This construction of the statute deprives appellant and her assignor of due process. The hearing is in actuality no hearing where the only issue which the Court is permitted to consider is a modification in exchange control restrictions. *Mooney v. Holohan*, 294 U. S. 103, 112; *Nashville C. & St. L. R. Co.* v. *Walters*, 294 U. S. 405, 414-6.

This construction of the statute further treats appellant and her assignor unequally in that beneficiaries located in other countries who have no greater freedom of ability to make gifts, are permitted to make gifts of the same kind of interests under the same circumstances pertaining to volition and freedom from duress.

There is in the record no evidence contradicting the fact that Mrs. Miculka donated the fund of her own violition, for good reason, with understandable motives, and with every intent that petitioner here should have the money. There is little if any likelihood that the fund will be available to Mrs. Miculka during her lifetime in any event.

We may assume that a State possesses the power of regulation over the manner and the terms upon which property within its dominion may be transmitted by will or

descent, and that in the exercise of that right, it may enact varying regulations controlling the method of administering decedents' estates. (*Matter of Braigr, supra*, 305 N. Y. 148, 156, app. dis. 346 U. S. 802.) However, this does not give the State the power to confiscate inheritances or to deprive a beneficiary of property which he may fully enjoy in a way freely determined by the beneficiary. The State may not, in effect, escheat property where the beneficiary is singled out and not treated in the same manner as all other beneficiaries in the same class. The beneficiary is entitled to equal protection of the law and, under the due process clause, to the enjoyment of his property, if enjoyment is available to him.

United States Const., Amendment XIV, § 1;
Kolovrat v. *Oregon*, *supra*, 366 U. S. 187;
Frost v. *Corporation Comm.*, 278 U. S. 515;
Myer v. *Myer*, 271 App. Div. 465, 472; affd. 296 N. Y. 979;
Wintermeyers Est. v. *People*, 120 Colo. 581, 212 P. 2d 863.

The bare language of the statute purports or purported to preserve the interest of a legatee until such time as the legatee might make free use or have the benefit or control of the property. If this were the construction placed on the statute by the Court of Appeals, it would have recognized the assignment of Mrs. Miculka to the petitioner and would have given it effect.

The Courts below, however, have construed the statute to mean that under no circumstances at any time so long as restrictive exchange controls exist in Czechoslovakia, can a beneficiary there residing make any disposition of her property even though the disposition is made voluntarily without the intercession of a foreign government—in fact without its knowledge—and without any danger of the fund being confiscated.

In this construction of the statute, the effect achieved is unconstitutional.

It is unconstitutional because it denies an effective hearing on the question of whether in fact the beneficiary has made a voluntary gift of her interest in the New York estate. The Trial Court is limited to consideration of change of circumstances pertaining only to currency exchange restrictions.

It is unconstitutional because it does not treat all people in the same category equally. It means that aliens in England can receive property or give it away, or do what they will with it, whereas aliens in the same category in Czechoslovakia with the same means of disposing of property may not touch it even though they are exercising nothing but the right of ownership vested in them by the statutes of descent and there is no danger that a hostile foreign government will confiscate the funds or deprive them of the property (Cf. *Matter of Rawski, infra*, p. 19, 28 Misc. 2d 253, 218 N.Y.S. 2d 111).

The question presented in this case has not, so far as we have been able to ascertain, ever heretofore been presented for actual decision to any court where after trial on the facts the evidence conclusively showed that the beneficiary acted without governmental duress and that the assignment, if recognized, could not result in confiscation of the property by a foreign government.

The constitutional question was not raised in *Matter of Geiger, supra.* In an earlier case where the constitutionality of Section 269 was presented,* the issue was merely the general power of the state to enact a statute with the ostensible intent expressed therein, but without considering the construction achieved by the Court of Appeals in *Matter of Geiger*, or in this case.

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* *Matter of Braier*, 305 N. Y. 148, appeal dismissed, 346 U. S. 802.

A statute may be perfectly valid, when enacted, with relation to a state of facts then existing, but unconstitutional and void as to a different state of facts.

Nashville C. & St. L. R. Co. v. *Walters*, 294 U. S. 405, 415;
Municipal Gas Co. v. *Public Service Comm.*, 225 N. Y. 89, 95-97;
Denihan Enterprises, Inc. v. *O'Dwyer*, 302 N. Y. 451, 458-9.

In the *Nashville* case, this Court stated (p. 415):

> "A statute valid as to one set of facts may be invalid as to another. A statute valid when enacted may become invalid by change in the conditions to which it is applied. The police power is subject to the constitutional limitation that it may not be exerted arbitrarily or unreasonably."

The principle is no less applicable to Section 269-a which fixes a standard of decision which may—in fact must—vary from time to time with change in conditions, both those of the political climate of foreign countries as well as those of the circumstances and capabilities of the individual beneficiaries. If Mrs. Miculka had gone to England and made the gift, it would clearly be honored by the Court. (*Matter of Rawski*, 218 N.Y.S. 2d 111, 28 Misc. 2d 253.) Why should it have less virtue because made in the American Embassy in Prague, where the same freedom of choice and absence of restraint or duress existed?

Geography should not be the test set up as a standard by the statute. The only constitutional determinant is the beneficiary's ability to use, benefit or control; in other words, freely to exercise the right of decision, the choice of disposition of an owner, without compulsion or duress,

and without the danger of the assets falling into the hands of a foreign government. Any other standard would lead to confiscation by our own authorities without justification.

Conclusion

This case presents for review a final decree of the New York Court of Appeals, which has decided in favor of the validity of Section 269-a of the Surrogates Court Act of the State of New York. The validity of the state statute was drawn in question by appellant on the ground that as construed by the Court of Appeals in this case, it is repugnant to the Constitution of the United States. The question was seasonably raised, appears in the record and presents a substantial federal question. The case falls within 28 U.S.C. § 1257, subd. 2. Jurisdiction by this Court should be noted, and the case set for plenary consideration.

Respectfully submitted,

SYDNEY J. SCHWARTZ,
Attorney for Petitioner-Appellant.

APPENDIX

Report of Decision of Court of Appeals.

In the Matter of the Estate of ALEXANDER MAREK, Deceased. JULIA IOANNOU, Appellant; THE PEOPLE OF THE STATE OF NEW YORK, et al., Respondents. (11 N. Y. 2d 740, 181 N. E. 2d 456.)

Argued January 17, 1962; decided February 22, 1962.

APPEAL, on constitutional grounds, from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered June 8, 1961, which unanimously affirmed an order of the Surrogate's Court of Bronx County (CHRISTOPHER C. MCGRATH, S.), dismissing a petition for an order directing the City Treasurer of the City of New York to pay over to the attorney for petitioner, as assignee of Viktoria Miculka, the amount deposited to the credit of said Viktoria Miculka pursuant to decree of the Surrogate's Court of Bronx County, dated June 27, 1956. That decree directed that the distributive share of the estate of one Alexander Marek, to which Viktoria Miculka was entitled as an aunt of the deceased, should be deposited with the City Treasurer, pursuant to section 269 of the Surrogate's Court Act (now § 269-a), since it appeared improbable that she, as a resident of Czechoslovakia, would have the beneficial use and enjoyment of the money. In petitioner's application to withdraw this money, she stated that, on May 13, 1957, Viktoria Miculka, of her own free will and without duress of any kind on the part of the governmental authorities of Czechoslovakia, assigned her interest in the deposit to petitioner and that the fund on deposit would not come into the possession of any governmental authorities of Czechoslovakia or any other foreign nation. The assignment was acknowledged before the United States Vice Consul at Prague, Czechoslovakia. A hearing was held to determine whether any circumstances

had changed since the impounding of the fund. In the Court of Appeals petitioner argued that section 269 (now § 269-a) of the [741]* Surrogate's Court Act did not prohibit a beneficiary of an estate from voluntarily assigning it and that, if construed to inhibit such a voluntary gift, the section was unconstitutional and void. Respondents argued that there was no showing that circumstances were so changed in Czechoslovakia as to warrant a determination that the distributee herself would have the sole benefit, use or control of her interest in the estate; that, absent such a determination, the fund was within the control of the court and not subject to assignment (citing *Matter of Geiger*, 7 N Y 2d 109), and that section 269 (now § 269-a) was constitutional (citing *Matter of Braier*, 305 N. Y. 148).

Sydney J. Schwartz for appellant.

Louis J. Lefkowitz, Attorney-General (*Kenneth D. Shearer, Paxton Blair* and *Julius Greenfield* of counsel), for respondents.

Order affirmed, with costs to all parties appearing separately and filing separate briefs payable out of the fund; no opinion.

Concur: Chief Judge Desmond and Judges Dye, Fuld, Froessel, Van Voorhis, Burke and Foster.

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* Numbers in brackets refer to pagination of official reports.

Opinion of the Surrogate.

(R. 67):

"McGrath, S.—Application for the withdrawal of certain monies on deposit with the City Treasurer is denied (Matter of Geiger, 7 N. Y. 2d 109). Settle order."

Opinion of Court of Appeals in Matter of Geiger.

In the Matter of the Estate of EMIL GEIGER, Deceased. IMRA KASZARAS et al., Appellants; BERNARD J. GOLDBERGER et al., as Executors of EMIL GEIGER, Deceased, Respondents (7 N. Y. 2d 109, 164 N. E. 2d 99).

Argued October 13, 1959; decided December 30, 1959.

[110] APPEAL from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered March 9, 1959, which affirmed unanimously, except as to appellant Cornelius F. Gustav (as to whom the affirmance was by a divided court), an order of the Surrogate's Court of Nassau County (JOHN D. BENNETT, S.; opinion 12 Misc. 2d 1043), denying a petition for an order directing that payments be made on account of distributive shares to distributees in Hungary and that payment be made to Cornelius F. Gustav in consideration of legal services rendered.

[111] DYE, J. The individual petitioners, except Cornelius F. Gustav, are all presently citizens of and reside in Hungary and are distributees of the estate of Emil F. Geiger, deceased. Their distributive shares aggregating $29,166.70 are being withheld by the Surrogate, pursuant to section 269 of the Surrogate's Court

Act, for reasons stated in *Matter of Herz* (7 Misc. 2d 217). The petitioner Gustav was formerly a member of the Bar of Hungary and is now a member of the New York Bar, domiciled in New York City.

This proceeding was brought by the petitioner Gustav individually and as attorney in fact for the aforesaid beneficiary petitioners for an order to compel the executors of the Geiger estate to pay him, as assignee, the sum of $7,291.65, being 25% of the foreign beneficiaries' share of the estate given "in consideration of legal services rendered by said attorney to them" and to pay to said Gustav, as attorney in fact, the sum of $250 monthly for the account of each of the foreign beneficiaries to the extent of their respective shares in the estate. The attorney in fact proposes to transfer the beneficial use of such funds to the respective beneficiaries by the purchase of so-called "Ikka" packages, which are an approved method for sending food and clothing in the nature of relief to persons residing in Hungary. We all agree that the petition, insofar as it concerned the payments of a distributive share to the petitioner distributees, was properly denied. The sole remaining issue is whether the assignment of 25% of the fund for legal services was also properly denied.

The purpose of section 269 as amended is to authorize the deposit of moneys or property in the Surrogate's Court in cases where transmission or payment to a beneficiary, legatee or other person resident in a foreign country might be circumvented by confiscation in whole or in part, and to authorize the impounding of the fund by the Surrogate to await the time when payment can be made to the beneficiary for his own benefit, use and control (cf. Bill or Revision Notes, 13B Gilbert-Bliss, Surrogate's Ct. Act, § 269).

[112] The record before us does not demonstrate, nor have appellants shown, any circumstances to change the situation as it existed at the time of the Nassau County

Surrogate's determination in *Matter of Herz* (*supra*). On its face, the assignment is of the distributees' share in said estate and, in light of the statute, relates to money which is not now within the distributees' beneficial use or control. This is not an application "for and to fix and determine the compensation of an attorney for services rendered to an estate * * * legatee, distributee or any person interested therein" (Surrogate's Ct. Act, § 231-a), nor is any showing made or attempted to be made as to whether 25% of the aggregate shares of these beneficiaries is a reasonable fee for services rendered. The petition, as we read it, is to enforce recognition of an assignment made in Hungary pertaining to moneys which are not now in the possession or control of the assignors but, in fact, are under the control of the Surrogate. So long as the distributive shares are properly being withheld by the Surrogate because of the special circumstances in which the beneficiaries find themselves as domiciliaries in an iron-curtain country, they are in no position presently to assign any part of the funds withheld. They may not place an assignee in a better position than they themselves enjoy as principals. This is not to say, however, that an attorney may not in a proper proceeding and upon a proper showing request a fixation of reasonable fees for services rendered, chargeable against the fund (Surrogate's Ct. Act, § 231-b).

The order appealed from should be affirmed, with costs to the respondents payable out of the estate.

FROESSEL, J. (dissenting). In this Surrogate's Court proceeding, petitioners seek (1) payment of legal fees under an assignment from the nonresident beneficiaries in an estate, and (2) part payments to said nonresident beneficiaries in the form of food and clothing packages. These beneficiaries are entitled to the sum of nearly $30,000 from this estate.

As to the attorney's fees, I agree with the dissenting Justices in the Appellate Division. Appellant Gustav appears to have rendered substantial legal services to the estate, including services in connection with a lawsuit involving $250,000 to set aside [113] a trust established by the deceased and which was successfully terminated by settlement. He left Hungary as a respected member of the Hungarian Bar in Budapest over 20 years ago, and has never returned. He served in the United States Army, from which he obtained an honorable discharge, became an American citizen, is now an attorney at law duly licensed to practice by the State of New York and is a member of the Federal Bar. So far as appears, he has no contact with the present Hungarian Government. He has performed his services, and if found reasonable is entitled to payment.

As to the payments due nonresident beneficiaries, the Surrogate, under section 269 of the Surrogate's Act, is authorized to withhold payments where it shall appear that a legatee or distributee "would not have the benefit or use or control of the money or other property due him, or where other special circumstances make it appear desirable that such payment should be withheld". This is an application for permission to withdraw installments of moneys for the purpose of sending food and clothing packages to the beneficiaries from time to time.

The Surrogate held no hearing on the application, but simply determined, on the basis of his former decision in *Matter of Herz* (7 Misc. 2d 217), that the court "does not believe it likely that the beneficiaries would have the use or control of the property constituting the subject matter of the application" and that "courts do not favor purported assignments of funds payable to iron-curtain country nationals and have labeled them attempts to circumvent section 269 of the Surrogate's Court Act". This is not such an application. Had the Surrogate held a hearing, it

might well have been developed, as alleged in the petition, that the beneficiaries are "all of advanced age, who are [now] living [in Hungary] under difficult conditions and are in great need of assistance", and that monetary assistance "can be transferred to them by sending food and clothing packages to each of them * * * free of duty and of any taxation". It might well have been further developed that these nationals have no way of leaving Hungary; that they are the very victims of the "events in Hungary" to which the Surrogate referred; that they will probably die there and never receive the benefit of their legacies if the moneys are withheld; [114] and that there are agencies which can assure delivery of food and clothing packages in reasonable amounts to named individuals.

It seems to me that the Surrogate abused his discretion in failing to grant a hearing so that these facts might have been developed and the matter decided, not on the basis of an application to pay legacies to iron-curtain country nationals, but on the application as made, namely, to allow reasonable sums of money for conversion into food and clothing packages upon a proper showing that they would reach the beneficiaries.

I vote for reversal and for a remission to the Surrogate of Nassau County for further proceedings not inconsistent with this opinion.

Chief Judge Conway and Judges Desmond, Van Voorhis and Burke concur with Judge Dye; Judge Froessel dissents in an opinion in which Judge Fuld concurs.

Order affirmed.